2007

Christopher M. Sullivan v. Utah Board of Oil, Gas and Mining, Kerr-McGhee Oil and Gas Onshore LP : Brief of Respondent

Utah Court of Appeals

UTAH SUPREME COURT

CHRISTOPHER M. SULLIVAN, Petitioner, vs. UTAH BOARD OF OIL, GAS & MINING, and KERR-McGEE OIL & GAS ONSHORE LP, Respondent.	**RESPONDENT KERR McGEE OIL & GAS ONSHORE LP's RESPONSE TO PETITIONER'S BRIEF** Case No. 20070410

Response to Brief for Review from Findings of Fact, Conclusions of Law and Order of the Board of Oil, Gas & Mining, Department of Natural Resources, State of Utah

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JURISDICTION

This case involves a contract dispute involving the payment of royalties from the production of oil in the Uintah Basin. Appellant Christopher M. Sullivan ("Sullivan") appealed the Board of Oil, Gas and Mining's ("Board") Findings of Fact, Conclusions of Law, and Order issued on April 25, 2007. This Court has jurisdiction to decide the appeal pursuant to UTAH CODE ANN. § 78-2-2(3)(e)(iv).

RESTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Sullivan's appeal raises the following issues, none of which warrant reversal and remand:

(a) Does UTAH CODE ANN. § 40-6-9 impose a non-discretionary duty on the Board to order that the disputed monies be deposited into an escrow account?

(b) Does UTAH CODE ANN. § 40-6-9 mandate that the Board conduct a formal adjudicatory hearing on the merits?

(c) Has Sullivan demonstrated substantial prejudice, as required by UTAH CODE ANN. § 63-46b-16(4), arising from the Board's refusal to order the disputed funds into escrow?

STANDARDS OF REVIEW

This Court shall grant relief "only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced" for any of the reasons set forth in the Administrative Code Procedures Act, UTAH

CODE ANN. § 63-46b-16(4). *See Adkins v. Board of Oil, Gas, Mining*, 926 P.2d 880, 882 (Utah 1996). "'A party has been substantially prejudiced if 'the alleged error was not harmless.'" *WWC Holding Co., Inc. v. Public Service Comm'n*, 2002 UT 23, ¶ 7, 44 P.3d 714 (2001) (internal citation omitted).

The abuse of discretion standard of review applies in this case. *WWC Holding Co.,* 2002 UT 23, ¶ 8; *accord Brown & Root Indus. Comm'n of Utah*, 947 P.2d 671, 677 (Utah 1997). Under this standard, the Board's holdings will not be disturbed "unless its determination exceeds the bounds of reasonableness and rationality." *Brown,* 947 P.2d at 677. Absent "a grant of discretion, legal issues are reviewed under a correction-of-error standard." *WWC Holding Co.,* 2002 UT 23, ¶ 8.

DETERMINATIVE LAW

To decide this case, the Court must construe and apply UTAH CODE ANN. § 40-6-9. This statute is attached hereto in its entirely as an addendum. The statute requires that the operator of oil and gas projects deposit payments into escrow "if accrued payments cannot be made within the time limits specified," and allows "any person legally entitled to the payment of the proceeds" from oil and gas production to petition the Board to request an "investigation and negotiation" to determine whether "reasonable justification" for the non-payment exists. The statute also allows the Board to hold an evidentiary hearing on the same.

STATEMENT OF CASE AND STATEMENT OF FACTS

1. **Sullivan's Interest Under the Assignment** Sullivan and Robert Weaver, through B&A Properties, LLC ("B&A"),[1] are the successors in interest to the rights reserved under an "Assignment Affecting Record Title to Oil and Gas Lease" from Joseph Thomas to Raymond Chorney ("Assignment"). **R44, 70.** This dispute centers on the interpretation of the following language in the Assignment: "Three Percent (3%) of 8/8, see attached rider." **R74-76; R100**. The Rider reads in pertinent part:

> Assignor hereby excepts and reserves an obligation equal to **$300.00 per acre for the number of acres assigned hereby, the same to be paid out of 3% of the market value at the wells, as produced**, of all the oil and gas which may be produced, saved and marketed from the above described lands under the terms of said lease or any extensions and renewals thereof.

R76 (emphasis added).

2. **Notice of Overpayment** On February 1, 2006, KMG notified Sullivan that "[KMG], its predecessors in interest, and other lessees have mistakenly made payments to you in excess of the obligation created by the Production Payment in the Parent Lease." **R45**. By letter dated March 7, 2006, counsel representing both Sullivan and B&A responded that they interpreted the Assignment to include both a 3% production payment and a 3% overriding royalty, for a combined 6% interest; they thereby requested additional funds. **R49-52**.

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[1] B&A declined to participate in the proceeding below.

Even though KMG viewed the reserved interest as satisfied, KMG made monthly deposits to a suspense account. **R104; R185** at 20.

3. **Request for Agency Action** On July 31, 2006, Sullivan filed a Request for Agency Action ("Request") before the Board of Oil, Gas and Mining ("Board") to determine his interest under the Assignment. **R3-7.**

4. On September 11, 2006, KMG filed its Response to Request for Agency Action ("Response"). In its Response, KMG requested that the Board summarily deny Sullivan's Request because KMG had already explained "why the proceeds have not been paid," and provided "reasonable justification" regarding the same. KMG explained that unlike Sullivan, KMG construed the Assignment as reserving a 3% production payment (which already had been satisfied), rather than two separate 3% interests. **R65-91.**

5. **Parallel Judicial Proceeding** On September 14, 2006, KMG filed an action in district court against both Sullivan and B&A seeking a declaratory judgment regarding its contract interpretation, and to specifically recover the amounts it overpaid to Sullivan and B&A. **R108.** Counterclaims were filed by Sullivan and B&A.

6. **Referral to Division** On December 6, 2006, as stipulated to by both parties and required by statute, the Board ordered the Division of Oil, Gas and Mining ("Division") to commence a 60-day investigation and negotiation. **R98;**

R183 at 5-8. On December 20, 2006, the Division informed the parties of the investigation and negotiation, and requested that each party provide relevant information. **R98**.

7. **Negotiation Before the Division** On January 31, 2007, after collecting information from the parties, the Division conducted the negotiation which did not successfully resolve the dispute. **R99-109**. During the negotiation, each party presented its case and contract interpretation, the Division asked clarifying questions to which each party responded, and then the parties broke up into different rooms for discussion and possible resolution. **R185** at 6.

8. **Division's Report** Following the negotiation, the Division issued its Memorandum Regarding Investigation and Negotiations, dated February 13, 2007 ("Division's Report"). The Division's Report sets forth the nature of the dispute, restates the statutory authority vested with the Division and Board, summarizes the facts and the parties' positions, and then provides its conclusions. **R99-108**. Of particular interest is that the Division acknowledged the parties were in agreement that the dispute concerned the interpretation of the language in the Assignment. **R101**. The Division also explained that the statute does not provide for the Board to determine if Sullivan "is legally entitled to payment" but rather, whether non-payment was with reasonable justification. **R101**. The Division further concluded that the:

> investigation did not find any information that, if offered and proved in a hearing before the Board, would show that Kerr McGee suspended payments to Sullivan without a good faith judgment that the payments were not owed. Without such facts being alleged there is no basis for a hearing on any issue the Board is authorized to decide. In short, . . . nothing has been offered to show that Kerr McGee has acted unreasonably.

R108. The Division then concluded that the "investigation of this matter did not discover facts that provide a proper basis for Board action if a hearing were held." **R108**.

9. **Sullivan's Response to Division's Report** On February 23, 2007, Sullivan submitted an unsolicited Response to Division's Report wherein he expressed dissatisfaction with the investigation, and asked for a continuance to allow him to collect additional information to allow a more "meaningful investigation" and time to review documents. **R110-115**.

10. **Board's Hearing** On March 28, 2007, the Board held a hearing. **R185**. At the hearing, James Allen, assistant attorney general representing the Division, reported on the investigation and negotiation, provided the Division's Report, and then recommended that the matter not be set for hearing by the Board. **R185** at 4. Mr. Allen also reviewed the Board's statutory authority, explaining that the Board could conduct a hearing to determine if reasonable justification existed for non-payment. **R185** at 4. Mr. Allen reported, however, that the parties concurred that "the reason the proceeds are unpaid is because they disagree as to

whether they are, in fact, owed to Sullivan." **R185** at 9. He then explained that the hearing before the Board was "discretionary, not mandatory," and if no hearing was held, the parties could still seek a remedy in the pending state court proceeding. **R185** at 8.

11. Sullivan's counsel, Chris Jones, then addressed the Board, specifically concurring that a hearing was not necessary because, as Mr. Jones stated, "this is a matter best decided before a court." **R185** at 11. Nevertheless, counsel for Sullivan requested that the Board order KMG to deposit the disputed funds in an escrow account. **R185** at 11. This was the only action Sullivan requested of the Board. **R185** at 19.

12. After the Board heard from each party and the Division, by unanimous decision, the Board agreed that no hearing was necessary. **R185** at 29.

13. **Board's Order Challenged Here** On April 25, 2007, the Board issued an order entitled Findings of Fact, Conclusions of Law, and Order ("Board Order"). **R117-122**. The Board's factual findings are limited to four paragraphs, noting that: (1) notice was properly given to the parties; (2) the parties had time to submit information to support their respective positions; (3) the investigation failed to resolve the dispute and the basis for the Division's recommendation; and (4) Sullivan concurred that the "underlying dispute should be decided in State court." **R118-119**. The Board also explained that it had discretion either to "(1) set a

hearing, or (2) decline to set a hearing and allow the petitioner to seek a remedy in a court of competent jurisdiction instead." **R119**. The Board then held that it would not set a hearing and invited the parties to resolve the dispute in the pending state court action. **R120**.

SUMMARY OF THE ARGUMENTS

Sullivan misconstrues the language of UTAH CODE ANN. § 40-6-9 and how it applies. Under the plain language of the statute, the Board acted within its discretion and authority in denying a hearing on the merits and in not ordering the deposit of monies into an escrow account. First, the statute provides relief only to those persons who are "legally entitled" to payment, not to persons who have a dispute over entitlement to payment. Second, Sullivan waived any right to exhaust all administrative remedies and, therefore, is barred from seeking judicial review of the Board's decision. In any event, nothing in the statute mandates that the Board hold a hearing. Third, the Board lacked authority to order the deposit of funds into escrow even if the Board had held a full evidentiary hearing and Sullivan prevailed.

In addition, Sullivan fails to demonstrate substantial prejudice because he can recover interest in the district court matter if he prevails. Finally, Sullivan's assertion that the Board failed to order a continuance of the administrative matter pending resolution of the case pending in district court lacks merit because

Sullivan failed to request such relief to the Board and nothing in the statute requires such a remedy.

ARGUMENT

I. SULLIVAN'S INTERPRETATION OF THE GOVERNING STATUTE LACKS MERIT

Sullivan contends that UTAH CODE ANN. § 40-6-9 required the Board to conduct an evidentiary hearing and order deposit of monies into escrow. Sullivan Br. at 16 (arguing that payment into escrow is not conditioned on a showing of lack of reasonable justification). As demonstrated below, Sullivan misconstrues the purpose and application of UTAH CODE ANN. § 40-6-9, and, the Board properly interpreted and applied its authority.

A. THE STATUTE APPLIES IN NARROW CIRCUMSTANCES

The statute applies to "any person *legally* entitled to payment[,]" and not to disputes over *whether* a person is legally entitled to payment, as Sullivan contends. UTAH CODE ANN. § 40-6-9(1)(a) (emphasis added). Operators, like KMG, are obligated to make deposits to escrow only "[i]f *accrued* payments cannot be made with the time limits" specified by the statute. *Id.* § 40-6-9(3)(b)(i) (emphasis added). For example, a company may not know where to make payment. The statute allows any person "entitled to oil and gas proceeds" to request that the Board conduct an "investigation and negotiation" and, if the negotiation does not

resolve the matter, to "conduct a hearing to determine why the proceeds have not been paid." *Id.* § 40-6-9(4)-(6).

Based on the above language, relief under the statute presupposes that a person is "legally entitled to payment." Sullivan did not need an investigation or hearing to know why he was not paid. Sullivan knew that a dispute existed on the threshold question of *whether* he was legally entitled to payment. Rather than requesting that the Board investigate whether "reasonable justification" existed for the lack of payment, he should have filed his breach of contract claims in state court. Because he did not do so, KMG filed the pending parallel state court action.

B. THE BOARD REASONABLY EXERCISED ITS DISCRETION TO DECLINE TO HOLD A HEARING

Sullivan's repeated assertion that the Board improperly denied him a formal "evidentiary hearing," *see* Sullivan Br. at 4, 6, 7, 9, 11, 14, 21, 23, 33-31, should be rejected for two reasons.

First, Sullivan waived any right he had to a formal or informal hearing, and failed to exhaust his administrative remedies thereby barring any right to judicial review. During the March 28, 2007 hearing, Sullivan, through his counsel, withdrew his request for a hearing and specifically conceded "that this is a matter best decided before a court." **R185** at 11. The Board noted in its Order that Sullivan "conceded at the hearing that the underlying dispute should be decided in State court." **R119**. Because Sullivan waived any alleged right to a hearing before

the Board and to exhaust *all* administrative remedies, he has lost any right to judicial review before this Court. *See* UTAH CODE ANN. § 63-46b-14(2) ("A party may seek judicial review only after exhausting *all* administrative remedies available....") (emphasis added).[2]

Second, nothing in the statute required the Board to conduct a formal evidentiary hearing. The statute provides that upon receipt of the petition for review, the Board "shall set the matter for investigation and negotiation by the division within 60 days." UTAH CODE ANN. § 40-6-9(5). In the event the Division cannot resolve the matter by investigation and negotiation, the statue provides that the Board "*may* set a hearing within 30 days." *Id.* § 40-6-9(6)(a) (emphasis added). If the Board does not set a hearing, "any information gathered during the investigation and negotiation shall be given to the petitioner who may then seek a remedy in a court of competent jurisdiction." *Id.* § 40-6-9(6)(b).

As evidenced by the plain language, nothing in the statute imposes a mandatory duty on the Board to hold a formal evidentiary hearing. Review of this plain language, using the basic statutory construction principles, evidences that the

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[2] KMG notes that the Order provided notice to Sullivan of a right of appeal to this Court. **R120-21**. KMG believes that the Board simply provided the standard language regarding appeal rights in the event Sullivan believed he had the right to an appeal. Nothing in the Order constituted (nor could it constitute) an admission that a right of jurisdiction existed in the face of a clear waiver of Sullivan's right to exhaust all administrative remedies.

Board properly interpreted and then applied its authority. *See, e.g., Nelson v. Salt Lake County*, 905 P.2d 872, 875 (Utah 1995) ("A statute is generally construed according to its plain language"); *Berrett v. Purser & Edwards*, 876 P.2d 367, 370 (Utah 1994) ("the interpretation must be based on the language used" and there is no power to "infer substantive terms into the text that are not already there").

The Board reasonably exercised its discretion to decline to hold a formal evidentiary hearing because Sullivan waived any right to a hearing.

C. THE BOARD REASONABLY DECLINED TO ORDER THE DEPOSIT OF FUNDS INTO ESCROW

Sullivan's claim that the disputed funds must be deposited into escrow lacks merit based on the statutory scheme and language. If the Board sets a hearing, the purpose is to determine (1) if the proceeds have been deposited in an interest bearing account, and (2) if "the delay of payment is without *reasonable justification*." UTAH CODE ANN. § 40-6-9(7) (emphasis added). If, after a *hearing*, there has been no escrow of disputed funds, the Board "may" order an accounting and interest at 1-1/2% as a "substitute for an escrow account interest rate." *Id.* § 40-6-9(7)(a). In addition, if, after a hearing, the Board finds that no "reasonable justification" exists and payments have not been escrowed, the Board can order an accounting, and/or payment of the appropriately suspended funds along with assessing interest. *Id.* § 40-6-9(7)(b). If, on the other hand, the Board finds "reasonable justification" exists for non-payment and payments have been

escrowed, no accounting or payment to the person is required until "the condition which justified suspension" is satisfied. *Id.* § 40-6-9(7)(d). Accordingly, nothing in the governing statutory language requires payment into escrow if "reasonable justification" exists for the non-payment.

In this case, the Board properly applied the statute. After the Division's investigation and negotiation, the Board scheduled a hearing to allow the parties to comment on whether the matter should be set for hearing. **R185**. The Division explained that the "investigation did not find any information that, if offered and proved in a hearing before the Board, would show that Kerr McGee suspended payments to Sullivan without a good faith judgment that the payments were not owed. Without such facts being alleged there is no basis for a hearing on any issue the Board is authorized to decide. In short, ... nothing has been offered to show that Kerr McGee has acted unreasonably." **R108**.

It was entirely reasonable for the Board to decline to order the deposit of monies into escrow given that Sullivan chose not to dispute the Division's finding that reasonable justification for withholding funds existed. More importantly, nothing in the statute allowed the Board to order the deposit of monies into escrow. Even if an evidentiary hearing had occurred, the most the Board could do is order payment to Sullivan with interest and penalties. UTAH CODE ANN. § 40-6-9(7)(b)(ii) ("If, *after* a hearing, the board finds the delay of payment *is without*

reasonable justification, the board may: if the proceeds have not been deposited in an interest bearing escrow account ..., assess a penalty of up to 25% of the total proceeds and interest as determined....").

II. SULLIVAN'S ALLEGED HARM LACKS MERIT

As to harm, Sullivan contends that he lost the benefit of interest on the monies that allegedly should have been placed in escrow. Sullivan Br. at 16. However, Sullivan cannot claim harm because he can recover interest if he prevails in the state court action. Both prejudgment and post judgment interest can be assessed through the state court action in favor of the prevailing party. *See* UTAH CODE ANN. §§ 15-1-1, 15-1-4. Because Sullivan cannot demonstrate that he has been substantially prejudiced, he is not entitled to relief in this Court. UTAH CODE ANN. § 63-46b-16(4) (no grant of relief allowed unless the aggrieved person "has been substantially prejudiced").[3]

III. THE STATUTE DOES NOT PROVIDE FOR A CONTINUANCE PENDING JUDICIAL REVIEW

Sullivan's argument that the Board should have continued "this matter pending a judicial adjudication to obtain an interpretation of the subject Assignment...." is devoid of any legal support. Sullivan Br. at 28. First, the statute

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[3] Moreover, Sullivan cannot demonstrate prejudice that he would not be able to recover penalties because penalties can be assessed only "after a hearing," *see* UTAH CODE ANN. § 40-6-9(7)(b)(ii), and Sullivan waived any right to a hearing.

itself does not provide for this course of action. Second, Sullivan never requested this relief from the Board and cannot do so now in this appeal.

Specifically, the statute provides for two options: either the Board can set a hearing or where the Board does not set a hearing, the petitioner is free to file an action in district court. UTAH CODE ANN. § 40-6-9(6)(a) & (b). Nowhere does the statute provide for a "continuance" of the administrative proceeding to allow a parallel judicial proceeding. Furthermore, while the Utah Administrative Procedures Act provides a process whereby Sullivan could petition the Board for a stay in the appropriate circumstances (which do not exist here), he failed to avail himself of that option. *See* UTAH CODE ANN. § 63-46b-18. Therefore, Sullivan's position is contrary to the authority granted to the Board.

Finally, even assuming the Board could continue the matter pending judicial intervention, Sullivan did not make that request to the Board.[4] Instead, as clearly set forth in the hearing minutes, Sullivan's only request was to place the disputed funds in escrow and nothing more. **R186** at 21. Because this position was not advanced before the Board, it cannot be considered on appeal. *See, e.g., Whitear v.*

[4] Sullivan submitted an unsolicited "Response to the DOGM Memorandum" and simply requested a continuance to allow him to obtain additional information and for the Division to conduct what he considered to be a "meaningful" investigation. **R113.** He did not request a continuance pending *judicial* review of this matter.

Labor Comm'n, 973 P.2d 982, 985 (Utah Ct. App. 1998) (holding that an issue not raised before administrative agency will not be considered on appeal).

IV. KMG DOES NOT OBJECT TO SUBMITTING TO THE BOARD'S JURISDICTION TO RESOLVE THE PENDING DISPUTE

As explained above, the statute's application is limited to persons "legally entitled to payment[,]" and not to disputes over whether a person is legally entitled to payment as Sullivan contends. UTAH CODE ANN. § 40-6-9(1)(a). To apply, the statute presupposes that one is legally entitled to payment. As recognized by the Division, the statute allows for an investigation and hearing into whether lack of payment is without "reasonable justification," but does not allow for a determination of market title or the legal entitlement to proceeds. R103. Such a determination is outside the expertise of the Board and is therefore better left for the court. **R103**.

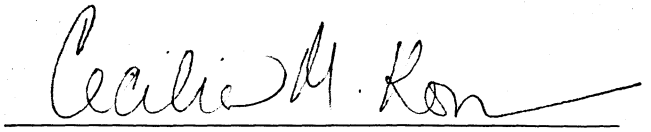
It is undisputed by both parties that this dispute centers on legal entitlement to oil and gas proceeds; specifically, the dispute centers on the interpretation of the reserved interest under the Assignment. **R100.** However, if this Court believes that the Board has jurisdiction to decide this issue, KMG agrees to submit to a formal adjudicative proceeding on the underlying dispute if the pending district court matter is stayed, and to deposit the disputed monies into escrow pending resolution of the administrative appeal process.

CONCLUSION

For the reasons set forth above, KMG respectfully requests that this Court disregard Sullivan's erroneous interpretation and application of the statute and deny his request for relief.

DATED this 6th day of December, 2007.

HOLLAND & HART LLP



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONSE TO PETITIONER'S BRIEF** was sent via U.S. first class mail, postage prepaid, on the 6th day of December, 2007 to the following:

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ADDENDUM

1 of 1 DOCUMENT

UTAH CODE ANNOTATED

*** STATUTES CURRENT THROUGH THE 2007 FIRST SPECIAL SESSION AND THE NOVEMBER 2007 ELECTION. ***
*** ANNOTATIONS CURRENT THROUGH 2007 UT 72 (11/27/2007); 2007 UT APP 301 (11/27/2007) AND SEPTEMBER 1, 2007 (FEDERAL CASES). ***

TITLE 40. MINES AND MINING
CHAPTER 6. BOARD AND DIVISION OF OIL, GAS AND MINING

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*Utah Code Ann. § **40-6-9*** (2007)

§ 40-6-9. Proceeds from sale of production -- Payment of proceeds -- Requirements -- Proceeding on petition to determine cause of nonpayment -- Remedies -- Penalties

(1) (a) The oil and gas proceeds derived from the sale of production from any well producing oil or gas in the state shall be paid to any person legally entitled to the payment of the proceeds not later than 180 days after the first day of the month following the date of the first sale and thereafter not later than 30 days after the end of the calendar month within which payment is received by the payor for production, unless other periods or arrangements are provided for in a valid contract with the person entitled to the proceeds.

(b) The payment shall be made directly to the person entitled to the payment by the payor.

(c) The payment is considered to have been made upon deposit in the United States mail.

(2) Payments shall be remitted to any person entitled to oil and gas proceeds annually for the aggregate of up to 12 months accumulation of proceeds, if the total amount owed is $ 100 or less.

(3) (a) Any delay in determining whether a person is legally entitled to an interest in the oil and gas proceeds does not affect payments to other persons entitled to payment.

(b) (i) If accrued payments cannot be made within the time limits specified in Subsection (1) or (2), the payor shall deposit all oil and gas proceeds credited to the eventual oil and gas proceeds owner to an escrow account in a federally insured bank or savings and loan institution using a standard escrow document form.

(ii) The deposit shall earn interest at the highest rate being offered by that institution for the amount and term of similar demand deposits.

(iii) The escrow agent may commingle money received into escrow from any one lessee or operator, purchaser, or other person legally responsible for payment.

(iv) Payment of principal and accrued interest from the escrow account shall be made by the escrow agent to the person legally entitled to them within 30 days from the date of receipt by the escrow agent of final legal determination of entitlement to the payment.

(v) Applicable escrow fees shall be deducted from the payments.

(4) Any person entitled to oil and gas proceeds may file a petition with the board to conduct a hearing to determine why the proceeds have not been paid.

(5) Upon receipt of the petition, the board shall set the matter for investigation and negotiation by the division within 60 days.

(6) (a) If the matter cannot be resolved by negotiation as of that date, the board may set a hearing within 30 days.

(b) If the board does not set a hearing, any information gathered during the investigation and negotiation shall be given to the petitioner who may then seek a remedy in a court of competent jurisdiction.

(7) (a) If, after a hearing, the board finds the proceeds have not been deposited in an interest bearing escrow account in accordance with Subsection (3), the board may order that:

(i) a complete accounting be made; and

(ii) the proceeds be subject to an interest rate of 1 1/2% per month, as a substitute for an escrow account interest rate, accruing from the date the payment should have been suspended in accordance with Subsection (3).

(b) If, after a hearing, the board finds the delay of payment is without reasonable justification, the board may:

(i) if the proceeds have been deposited in an interest bearing escrow account in accordance with Subsection (3):

(A) order a complete accounting;

(B) require the proceeds and accruing interest to remain in the escrow account; and

(C) assess a penalty of up to 25% of the total proceeds and interest in the escrow account; or

(ii) if the proceeds have not been deposited in an interest bearing escrow account in accordance with Subsection (3), assess a penalty of up to 25% of the total proceeds and interest as determined under Subsection (a).

(c) (i) Upon finding that the delay of payment is without reasonable justification, the board shall set a date not later than 90 days from the hearing for final distribution of the total sum.

(ii) If payment is not made by the required date, the total proceeds, interest, and any penalty as provided in Subsection (b) shall be subject to interest at a rate of 1 1/2% per month until paid.

(d) If, after a hearing, the board finds the delay of payment is with reasonable justification and the proceeds have been deposited in an interest bearing escrow account in accordance with Subsection (3), the payor may not be required to make an accounting or payment of appropriately suspended proceeds until the condition which justified suspension has been satisfied.

(8) The circumstances under which the board may find the suspension of payment of proceeds is made with reasonable justification, such that the penalty provisions of Subsections (7)(b) and (7)(c)(ii) do not apply, include, but are not limited to, the following:

(a) the payor:

(i) fails to make the payment in good faith reliance upon a title opinion by a licensed Utah attorney objecting to the lack of good and marketable title of record of the person claiming entitlement to payment; and

(ii) furnishes a copy of the relevant portions of the opinion to the person for necessary curative action;

(b) the payor receives information which:

(i) in the payor's good faith judgment, brings into question the entitlement of the person claiming the right to the payment to receive that payment;

(ii) has rendered the title unmarketable; or

(iii) may expose the payor to the risk of liability to third parties if the payment is made;

(c) the total amount of oil and gas proceeds in possession of the payor owed to the person making claim to payment is less than $ 100 at the end of any month; or

(d) the person entitled to payment has failed or refused to execute a division or transfer order acknowledging the proper interest to which the person claims to be entitled and setting forth the mailing address to which payment may be directed, provided the division or transfer order does not alter or amend the terms of the lease.

(9) If the circumstances described in Subsection (8)(a) or (b) arise, the payor may:

(a) suspend and escrow the payments in accordance with Subsection (3); or

(b) at the request and expense of the person claiming entitlement to the payment, make the payment into court on an interpleader action to resolve the claim and avoid liability under this chapter.

HISTORY: C. 1953, 40-6-9, enacted by L. 1983, ch. 205, § 1; 1989, ch. 86, § 2; 1992, ch. 34, § 4; 1993, ch. 151, § 1.

NOTES TO DECISIONS

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Cited.

ENTITLEMENT TO PROCEEDS.

A nonconsenting owner of an undivided interest in lands within a drilling unit was not legally entitled to a share of the proceeds from oil and gas wells within the unit because there was no pooling arrangement, voluntary or involuntary, between the owner and the operator of the wells. *Bennion v. Graham Resources, Inc., 849 P.2d 569 (Utah 1993).*

CITED in *In re SAM Oil, Inc., 817 P.2d 299 (Utah 1991).*

COLLATERAL REFERENCES

JOURNAL OF ENERGY NATURAL RESOURCES AND ENVIRONMENTAL LAW. --Nonconsenting Mineral Interest Owners Not Entitled to Oil and Gas Proceeds, 14 J. Energy, Nat. Resources, & Envtl. L. 181 (1994).

A.L.R. --Oil and gas: rights of royalty owners to take-or-pay settlements, 57 A.L.R.5th 753.